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In the Supreme Court of the United States

OCTOBER TERM, 1971

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LUTHER DEWEY MELTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Acting Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-509

LUTHER DEWEY MELTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1971. The petition for a writ of certiorari was filed on October 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for the wrongful disposition of government property, cross-examination of petitioner as to his connection with a forged form and the manner in which he made a deposit of government money was proper.

2. Whether the trial court erred in excluding correspondence dealing with the procurement of property which was not the subject of the indictment.

3. Whether the trial judge's instructions on criminal intent were sufficient to encompass petitioner's theory that he was proceeding in good faith without the requisite criminal intent.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on eight counts of having knowingly disposed of government property without authority, in violation of 18 U.S.C. 641. He was sentenced to concurrent prison terms of three years on each count.

The evidence shows that during the period 1962-1966, petitioner, who was Commander of a National Guard artillery battery located at Portsmouth, Virginia, was authorized to draw surplus Department of Defense supplies for the use of the Virginia National Guard. The customary procedure was for petitioner's unit to be advised by state headquarters as to what was needed for National Guard purposes or for the unit to obtain prior approval before requisitioning surplus property. After the surplus was obtained, General Booth,

the Commanding General, decided upon its distribution through the state, with title to the property remaining with the federal government; all such distributions were without cost to the receiving organizations (Tr. 43-46, 75, 83, 219-232, 250, 453).[1]

Between 1965 and 1967 petitioner, dealing through the Portsmouth City Manager, one Johnson, offered to sell the City of Portsmouth military surplus equipment. After inspection, Johnson agreed to buy eight pieces of automotive equipment. Petitioner, in the name of his National Guard battery, requisitioned the desired pieces which were furnished to his unit without cost. Although petitioner had no authority to sell military surplus to the City of Portsmouth (Tr. 222, 249), he sold the eight pieces of equipment, which became the subject matter of the indictment, to the city for approximately $7,000; he deposited this sum in a personal checking account (Tr. 52-62, 88-111, 178-183, 199-200, 290-299, 479, 510).[2]

Other evidence showing petitioner's intent was introduced. In 1966 petitioner was interviewed by an investigating F.B.I. agent and signed a statement (Tr. 349-363) in which he expressed awareness that he was not authorized to sell a certain surplus government jeep which was then in his custody (Tr. 358-359).[3]

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[1] "Tr." refers to the three volume trial transcript which we are lodging with the Clerk of this Court.

[2] Petitioner also furnished some military surplus to the city at no charge. These transfers were not the subject matter of the indictment (Tr. 193-194, 402-404, 454-460; Pet. 8).

[3] Petitioner asserts that he received an interim F.B.I. clearance of his surplus property dealings with the city (Pet. 10). The F.B.I. agent denied giving any such clearance (Tr. 369).

However, this jeep was one of the eight pieces of equipment he sold to the city in 1967 (Count 1) (Tr. 55, 57, 363). Petitioner made the sale after his authority to requisition surplus had been revoked by General Booth (Tr. 247). None of the eight transactions with the city was recorded on the battery supply records (Tr. 325-326).

Petitioner testified that the City of Portsmouth had paid him for property which he had requisitioned and transferred to it. He explained that he had received the money for "giving" the property to the city and that it was understood that such property had to be returned on request to the federal government. He stated that the money given to him was intended by city manager Johnson to be the city's contribution to his unit's "welfare" or entertainment funds,[4] and that he handled this money through his personal account because of military regulations placing certain limitations on the use of official funds (Tr. 460-461, 472-473, 476-479).

ARGUMENT

1. Petitioner contends that his cross-examination was improper in that the examiner implied that he was a forger and embezzler in inquiring about matters which, it is claimed, were "completely unrelated to the crimes charged" (Pet. 16-19).

The question as to the forgery involved a heavy duty crane, part of a five vehicle sale by petitioner to the city (Counts 2-6). In making the sale, petitioner fur-

[4] City manager Johnson denied this and claimed that outright sales were made, with no duty of return (Tr. 197-200, 206, 214).

nished the city with a federal government form, purportedly signed by one Barnes, a United States property disposal officer, which directed the city to remit the loading charge directly to the Treasurer of the United States, with the balance payable to petitioner's unit (Tr. 100, 102, 106-108, 494).[5] Barnes, called as a government witness, testified that the government form had neither been prepared by his office nor signed by him (Tr. 156-157). On cross-examination, petitioner was asked about and denied forging Barnes' signature. This question was proper since petitioner's direct testimony of good intent and open dealings in making the property transfers tended to contradict Barnes' testimony concerning the falsity of the documents furnished to the city. The question of petitioner's planning and intent was critical; searching inquiry on cross-examination to test his credibility was clearly proper. See *Powers* v. *United States,* 223 U.S. 303, 315-316; *United States* v. *Prionas,* 438 F.2d 1049 (C.A. 8), certiorari denied, 402 U.S. 977; *Marteney* v. *United States,* 218 F.2d 258, 265 (C.A. 10), certiorari denied, 348 U.S. 953; *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F.2d 338, 369-370 (C.A. 9), certiorari denied, 343 U.S. 935.

As to the embezzlement question, in his direct testimony petitioner sought to account for the approximately $7,000 that he had received from the city by claiming that he had disbursed the money from his personal account for battery purposes on parties, whis-

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[5] Despite the request, the city included the loading charge in its purchase payment to petitioner's unit. Petitioner deposited the city check to his personal account, but thereafter had his battery pay the loading charge (Tr. 30, 106-107, 500, 505-506).

key and merchandise (Tr. 479-480, 482).[6] When petitioner's counsel asked why petitioner took $575 out of his personal account and deposited it in the battery fund, petitioner claimed an inability to recall (Tr. 483). Previously introduced evidence had indicated, however, that a battery fund is financed by state quarterly remittances so that a military unit may pay its incidental operating expenses and that petitioner in 1966 had accumulated three quarterly remittances before depositing them in the unit fund (Tr. 326-327). On cross-examination, petitioner acknowledged that these quarterly remittances had been deposited initially in his personal account and that some months later he had transferred an equivalent amount from his personal account to the battery account (Tr. 560-568). With the evidence in this posture, the prosecutor asked if petitioner had prepared the late deposits to the battery account in such a manner so as to conceal his earlier embezzlement of the quarterly checks (Tr. 571). After defense objection, the court ruled that the question was proper and instructed the jury that petitioner was not charged with embezzling these quarterly allotment funds, but that the purpose of the prosecution inquiry was to test petitioner's credibility (Tr. 577,

[6] Petitioner possibly accounted for $2900 of this money, that being the approximate amount of his whiskey purchases (Tr. 557). Petitioner makes reference to a $4,327.55 check to an Anchor Merchandise Company (Pet. 16). This is misleading as that check was not written against the $7,000 which petitioner had received from the City of Portsmouth for military surplus vehicles. The Anchor remittance was derived from money which petitioner had collected from his enlisted men. As petitioner acknowledged at trial on cross-examination, the payment to Anchor had "[n]othing whatsoever" to do with the present case (Tr. 558).

580). Despite the court's ruling, the prosecutor did not renew his inquiry and the question was never answered (see Tr. 580-581). This isolated reference resulted in no measurable prejudice. Moreover, the question was relevant on the issue of petitioner's intent and motive in making the sales of equipment since it showed his ready willingness to transfer battery funds to his own account.

2. Petitioner urges that the court erred by excluding correspondence he received from General Booth relating to past practices in his requisition of military surplus property "for the use of certain municipalities" since this would have shown the reason for his alleged belief that he had the "authority to dispose of the property" here involved in the manner in which he did (Pet. 4, 20-23). The letters (see Pet. App. 7-22), however, are not contradictory of General Booth's testimony that petitioner had no such authority, nor are they corroborative of petitioner's present claim. Indeed, at trial petitioner testified that General Booth controlled the distribution of all surplus property obtained for National Guard purposes (Tr. 453, 456) and that he was motivated to obtain the property for the city because city manager Johnson had requested him to do so (Tr. 457, 517). The excluded letters are merely amplifications of what was undisputed at trial—namely that petitioner, on many occasions, had been directed to search for various surplus items which the National Guard needed, and that, on some occasions, surplus so obtained was lent to a subdivision of the Commonwealth of Virginia (Tr. 230-232).[7] They do not show

[7] Such loans were for National Guard use when an emergency

any authority on petitioner's part to sell surplus to municipalities. Since the letters did not aid petitioner's defense and dealt with the procurement of items unrelated to the property involved in the instant case, they were properly excluded.

3. Petitioner contends that, under the trial judge's instructions (set forth at Pet. App. 23-31), the jury could have convicted him even though it found that he genuinely believed that he had authority to transfer the property to the city and had no intent to do anything illegal (Pet. 23-26). This contention is unfounded since the court made it clear that petitioner could be convicted only if he had acted "voluntarily and intentionally and with a specific intent" to dispose of government property without authority (Pet. App. 24-25). The instructions adequately embodied petitioner's theory of defense that he had acted in good faith. See *United States* v. *Bessesen,* 445 F.2d 463, 467-470 (C.A. 7).

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occurred in a regional area or were for the use of National Guard regional shops (Tr. 232, 599, 617; see Pet. App. 10). When such property was left with a state subdivision, for the convenience of the National Guard, title to the property, unlike the present case, was never transferred to the political subdivision of the state (Tr. 232, 238-242).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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